Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/26000/2014

THE IMMIGRATION ACTS

Heard at Glasgow
on 4 August 2015

Determination issued
On 18 August 2015

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JIBAN KUMARI BHANDARI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Aitken, Senior Presenting Officer
For the Respondent: Mr D Brown, of Drummond Miller, Solicitors

DETERMINATION AND REASONS

1. The appellant is a citizen of Nepal whose date of birth is recorded as 1 January 1955. She entered the UK as a visitor on 3 October 2013. By application dated 24 March 2014 she sought leave to remain as the dependent relative of her son. She could not meet the requirements of the Immigration Rules but relied on Article 8 of the ECHR outwith the Rules, relying on strong family life with her UK sponsor and his family, absence of other family members in Nepal to provide support, and health care needs.

2. The respondent refused her application on 4 June 2014. She appealed to the First-tier Tribunal.

3. Judge Morrison dismissed the appellant's appeal by determination promulgated on 19 November 2014.

4. The appellant sought permission to appeal to the Upper Tribunal on the following grounds:-

> "1. Having regard to irrelevant considerations. A medical report described the appellant's condition including severely restricted mobility. At paragraph 21(i) the Judge said: *"The appellant was able to enter and leave the hearing room without requiring assistance either from her son or any form of mechanical assistance and for that reason I am only prepared to place limited weight on Dr Shah's report"* … the Judge was not in a position of expertise to restrict the medical evidence … clearly an important factor in the assessment of Article 8 especially when one considers that he has made a finding that a strong family life existed between the appellant and the sponsor.
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> 2. Error in consideration of availability of care facilities in Nepal. At paragraph 20 the Judge states: *"In addition there is no suggestion that either the appellant or sponsor carried out any research of their own in relation to availability or affordability of care services in Nepal"*. However, at paragraph 21(iii) the Judge refers to a letter from the city council which confirms that there was no provision for care homes for the elderly … the Judge also erred by irrationally placing no weight on the report simply on the basis that *"it has also been prepared for the purpose of the application and there is no other evidence … that care home facilities or day to day care are not available in Nepal or if such care is available then it would not be affordable."*
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> 3. The Judge has therefore failed to carry out a proper assessment of the appellant's Article 8 case. Clearly in circumstances where a Judge has made findings that a strong family life existed between the appellant and her son and that the appellant had no other close relatives in Nepal the findings … in respect of the appellant's health condition and availability of care were material factors in any Article 8 assessment. In erroneously failing to take them into account the Judge has erred in law."

5. A First-Tier Tribunal Judge refused permission to appeal, considering the grounds to be only disagreement and an attempt to re-argue. However, on 12 May 2015 a Deputy Upper Tribunal Judge granted permission, saying:

> "On balance there is sufficient in the grounds to make out an arguable case that the Judge erred in his approach to the appellant's evidence. It is arguable that the Judge adopted a two stage consideration of … Article 8 … - R (MM & Others) [2014] EWCA Civ 985, Ganesabalan [2014] EWHC 2712 (Admin)."

Submissions for appellant.

6. Further to ground 1: the Judge by using the phrase *"for that reason"* made his view trenchantly clear. Even if he was entitled to take some account of his own common sense observations, he made too much of them and too little of medical evidence which included a record of a shoulder injury as a result of a fall, which confirmed an underlying mobility problem. The point was obviously material, being a factor in finding there to be no good arguable case.

7. Ground 2: the appellant had produced a letter from her local authority in Nepal showing that there was no provision for care for the elderly. Research had been carried out. That was the best evidence available. The Judge provided insufficient reasoning for not accepting it.

8. Ground 3: the Judge had made an unusually strong positive finding of family life between adults, based on the appellant's dependency. Reflecting the terms of the grant of permission, the Judge should not have found a two stage approach to be a barrier to full consideration of Article 8. The Judge did touch on such matters at paragraph 30, but that was inadequate.

9. The determination should be set aside and a fresh hearing ordered as it might be appropriate to have further evidence on the availability of care facilities in Nepal.

Submissions for respondent.

10. It was for the Judge to give such weight as he thought fit to each aspect of the evidence including the medical report. He was entitled to take account of his own observations so as to lessen the weight to be given to the report. Reading his determination fairly and as a whole, that was only one of a number of reasons. At paragraphs 18 and 19 (i) – (iv), in particular, the Judge gave several reasons for finding that the appellant sought to mislead the respondent and the Tribunal, that there were significant discrepancies in the evidence, and that she was all in all an unimpressive witness. It was notable that the medical report and the letter from the local authority in Nepal had both been obtained prior to the appellant's entry to the United Kingdom. She admitted (although her son denied) that she came here with the intention of remaining. She had prepared the way for a further in-country application and entered under false pretences. Those justified findings properly diminished the weight to be given to the documentary evidence as to which the judge was said to have gone wrong. The first and second grounds had to be seen in that context. The degree of weight to be given to the documents was for the Judge. That could be interfered with only on grounds of perversity or irrationality, which were not averred. The appellant complained that there was error in the assessment of availability of care in Nepal but that was not relevant as she had not been found to have any significant care needs, which was a prior consideration. There was no error of approach arising from the third ground of appeal or from any question of a two stage or single stage approach to Article 8. The determination at paragraph 30 made it clear what the Judge's view on proportionality was in any event. A finding of strong family life between the appellant and sponsor did not entitle her to a successful outcome. A comparison could be drawn with *Singh* [2015] EWCA Civ 630 at paragraph 25 where the Court of Appeal found that the debate whether an applicant has or has not a family life for the purposes of Article 8 was "liable to be arid and academic" because the proportionality factors were the same regardless of whether family or private life was engaged. The determination referred to all relevant factors and contained all that was required to address Article 8 whether treated in one or in two stages.

Discussion and conclusions.

11. The Judge was entitled to observe that despite her claims of severely restricted mobility the appellant entered and left the hearing room without assistance. That was a sensible reason for limiting the weight to be placed on Dr Shah's report. The Judge did not give the report no weight at all. His use of the phrase *"for that reason"* should not be construed so strictly as to avoid reference to the rest of the

determination. He gave several good reasons for finding the appellant an unimpressive witness, with which reasons no quarrel could properly be taken.

12. The Judge expressed himself clearly and strongly also on the document from the local authority, saying that he was "*not prepared to place any weight*" upon it, but again that should not be taken out of context. The Judge was correct to observe that there was no evidence that care home facilities or day to day care were not available elsewhere in Nepal or that they would not be affordable. The appellant's son has supported her from the UK and could continue to do so if she were in Nepal, where the costs of assistance are likely to be lower. As the Presenting Officer pointed out, she was not found to have any very significant care needs apart from, as accepted by the Judge, "*a restricted range of movement in her shoulder which may interfere with some of her day to day activities*". Even at highest and at face value the letter could not advance the appellant's case very far.

13. The appellant accepted that her case fell short of the Immigration Rules in respect of adult dependent relatives with care needs. The Judge correctly took those Rules as a starting point at paragraph 23. The submission was made to him that those provisions themselves were not compliant with Article 8, but the Judge was not persuaded. That argument has rightly not been pursued in the Upper Tribunal.

14. *Asif Ali Ashiq* [2015] CSIH 31 was a judicial review case but its observations are equally applicable to the approach to be taken by tribunals. Giving the opinion of the Court, Lady Smith said:

> [4] The rules cannot, however, be construed as providing a complete code for all article 8 claims: *MS* v *Secretary of State for the Home Department; MF (Nigeria)* v *Secretary of State for the Home Department*. Facts and circumstances are bound to arise from time to time which were not expressly foreseen by the drafters of the rules yet are such as might, on an application of article 8, require the grant of a right to remain. The rules do not dispense with the duty, under primary legislation (the Human Rights Act), of those who make decisions about family life claims to comply with the provisions of the convention. Nor could they properly have done so; their exposure to the democratic process, as explained in *MS,* was limited. Thus, if a family life claim arises and it does not qualify under the rules, the Secretary of State must nonetheless consider it, in implement of her statutory duty.
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> [5] But how is a decision maker to do that and to show that, when reaching his decision, he recognised and understood his article 8 duties? How is he to show that he did not confine himself to an application of the rules? The answer has been discussed in a number of recent cases (*Izuazu (Article 8 – new Rules)* [2013] UKUT; *R (Nagre)* v *Home Secretary* [2013] EWHC 720 (Admin); *MS* v *Secretary of State for the Home Department*; *Singh* v *Secretary of State for the Home Department*, *Khalid* v *Secretary of State for the Home Department* [2015] EWCA Civ 74). These discussions refer to there being two stages – first, consideration of whether the applicant can bring himself within the new rules and then, secondly, whether, considering article 8 separately from the rules, leave to remain should be granted. Equally, however, as the discussions have progressed, it has been made clear that it is not a formulaic approach that is required. The point is, rather, one of substance. The decision maker needs to show that the application has been considered by reference to the rules and that it has also been considered simply by reference to article 8 but the need is for him to do that, not to do it in a particular way. No doubt consideration by reference to the rules will normally

> take place first. If it is not decided that leave to remain can be granted on that basis, the decision maker will then need to address article 8. It may be that, at that stage, the decision maker concludes that any family or private life issues raised have in fact already been fully addressed at the first stage in which case, adopting the language of Underhill LJ in *Singh* v *Secretary of State for the Home Department* at paragraph 66, "obviously there is no need to go through it all again" and all that will be necessary is for the decision maker, "to say so". There will be no need to conduct a full separate examination of the facts on an application of article 8 outside the rules if all the relevant issues have already been addressed in the consideration under the rules.
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> [6] An issue arose before us, albeit somewhat tangentially, as to whether there is an intermediary test – between consideration under the Rules and consideration outside the rules – involving the decision maker deciding whether the application includes a "good arguable case" that leave should be granted on article 8 grounds, outside the Rules and only if he concludes that it does, going on to assess that claim. The discussions in paragraph 30 of *MS* and paragraphs 29 - 30 of *Nagre* might be thought to suggest that there is an entirely separate stage involving such a test. In *MM (Lebanon)* v *Secretary of State for the Home Department* [2014] EWCA Civ 985, Aikens LJ said, at paragraph 129, that he could not see much utility in imposing such a further, intermediary, test; if the applicant cannot satisfy the rules, then there either is or there is not a further article 8 claim and that will have to be determined by the relevant decision-maker. We agree. That is what, essentially, was clarified in *Izuazu*, *MS,* and *MF* and we do not read the references to "good arguable case" as imposing another separate hurdle to be overcome by an applicant. The reference to "good arguable case" must, we consider, be read as referring to the need for it to be evident from the terms of the application that an article 8 issue arises. For the avoidance of doubt, we do not read it as, in a fresh application case, detracting from the terms of Rule 353 (see below). It does not raise the bar any higher than the need for there to be "realistic prospects" of the claim succeeding. That was recognised by the court in *MS* where, having discussed whether the petitioner had presented a good arguable case, it observed that, in concluding that there was no realistic prospect of the claim succeeding before an immigration judge, the Lord Ordinary had "taken in the ambit of the test that we have adopted." (at paragraph 36)

15. Paragraph 29 of the present determination makes it clear that the Judge did not think this to be a case requiring a full separate examination under Article 8. He came to that view notwithstanding his finding of a strong family life among the appellant, her son and his family which had not been considered in detail by the respondent.

16. If the Judge did think there to be intermediate test, he clearly thought it was a lower one. The outcome would have been no different. As the Court said in *Ashiq*, the issue is not one of the formula adopted but of substance. Paragraph 30 of the determination says all that might be needed.

17. The Judge in my view made no material error by taking account to the extent that he did of his observations of the appellant's mobility, by placing limited weight on the report of Dr Shah, and by placing no weight on the letter from the local authority. Nor did he make any material error in relation to the assessment of the case under Article 8. He came to a view on the whole facts and circumstances which was plainly open to him, which was properly justified.

18. It is not strictly necessary to go further than that for present purposes, but I do not think there could realistically have been another outcome under Article 8 of the ECHR outside the Rules. If there had been any error of approach which required a fresh decision, then on the evidence and submissions advanced for both sides I would have had no difficulty in reaching the same result.

19. The determination of the First-Tier Tribunal shall stand.

6 August 2015
Upper Tribunal Judge Macleman